IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 550 OF 1989

Mohan Ramji Goyal
Age 21 yrs. Occ. Labourer
R/o Ambedkar Colony, Nasik. ..Appellant

Vs.

The State of Maharashtra ..Respondent

Mr. Prakash Naik for the appellant.
Mr. P.A. Pol, APP for State.

CORAM: B.H. MARLAPALLE, J.

Date : August 01, 2007.

ORAL JUDGMENT:

1. This appeal arises from the order of conviction and sentence passed by the learned 3rd Additional Sessions Judge, Nashik on 5/7/1989 in Sessions Case No. 37 of 1989. The appellant-accused came to be convicted for the offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act for short) and he has been sentenced to undergo RI for 10 years and to pay a fine of Rs.1 lac in default thereof to suffer RI for

two years. His property was directed to be confiscated to the State under Section 61 of the NDPS Act. He was in custody from 8/10/1988 to 10/3/1989 and, therefore, he was ordered to be given the benefit of set off under Section 428 of Cr.P.C. for the said period. While admitting this appeal, a Division Bench of this court continued him on bail.

2. As per the prosecution PSI Prakash Sonar (PW 4) while on duty at Sarkarwada Police Station on 8/10/1988 received an information at about 8 p.m. that one person was coming from Shalimar Chauk with brown sugar wrappers for sale near Raviwar Karanja bus stop by the city bus coming via Ashok Stambha to Raviwar Karanja. PSI Sonar, therefore, submitted a report to this effect to his superior Shri Panditrao after recording the said information in the register and sought permission to effect the raid. Two panchas, namely, Yadav Sonu Patil (PW 1) and Sham Balu Barve were called in the police station and ASI Aher (PW 2) along with police constable Namdeo Jadhav and other constables disclosed them the information and stated that the raid was to be conducted for which

they would act as panchas. PI Panditrao granted sanction for the raid and the raiding party reached the bus stop near Shani Mandir by walk at about 8.10 to 8.15 p.m. and kept waiting in the midst of the crowd. The accused, after some time, got down from the city bus and he was accosted by the police constable Namdeo Jadhav and was surrounded by the raiding party. He was searched and a match box containing five small wrappers of brown sugar was allegedly found in the right hand side pocket of his pant. The material was weighed along with the wrappers and it was found to be 1 gm. and 370 ml.gms. The wrappers were thereafter kept in the match box and sealed by PW 4 in the presence of two panchas. Panchanama of attachment was drawn and thereafter the accused and the property were taken to the police station by PSI Sonar and others. A report was submitted to PI Panditrao by PW 4 PSI Sonar and PI Panditrao directed to register the crime. Hence PW 2 Aher registered an FIR (Exh.17) on 8/10/1988. On completion of the investigation, charge-sheet came to be filed and the charge was framed on 12/6/1989.

3. The prosecution examined in all four witnesses, namely, Yadav Sonu Patil (PW 1) as a panch witness, ASI Vasant Aher (PW 2) attached to Sarkarwada Police Station, Shri Fakira Rote, Police Constable and Shri Prakash Sonar, PSI (PW 4). The trial court on assessment of the oral and documentary evidence as placed before it by the prosecution, held that the prosecution had proved its case beyond a reasonable doubt that the accused Mohan Ramji Goyal was found in possession of five brown sugar wrappers as kept in the match box on his person in the right side pocket of his trouser in the night of 8/10/1988 near Shani Mandir bus stop of Raviwar Karanja. In an appeal arising from an order of conviction and sentence under the NDPS Act, it is necessary to examine whether the requirements of Sections 42, 50 and 57 of the said Act were complied with by the prosecution right from the stage of receiving the information till the stage of submitting a report to the Senior Officer after completing the raid. In the impugned order of conviction and sentence this requirement appears to be lacking and, therefore, as an appellate court, it is necessary to examine the evidence, oral and

documentary that was placed before the trial court by the prosecution.

4. PW 2 Aher in his depositions before the trial court stated that on 8/10/1988 he was on duty on Malhar Police Chauky in Raviwar Peth and at about 8.00 p.m. when he went to police station Sarkarwada for handing over the male and for attending the roll-call, one informant came to PSI Sonar and disclosed that one boy by name Mohan Ramji Goyal, resident of Red Cross Society, was carrying brown sugar wrappers with him and he was likely to get down at Raviwar Karanja. PSI Sonar, therefore, submitted a report to PI Panditrao and sought permission for raid (Ex.13) and an entry to the same effect was made in the station diary at Sr.No.38 and the report at Exh.13 was endorsed by PSI Sonar. Station diary extract was placed on the record at Exh.14. Two panchas were called to the police station, namely, Yadav Sonu Patil (PW 1) and Sham Balu Barve. They were informed by PSI Sonar about the information and the proposed raid and they were asked to act as panchas. He along with PSI Sonar, two panchas and three constables went on foot and reached

near the bus stop of Shani Mandir and the members of the raiding party kept waiting in the midst of the crowd. Within 1-12 minutes a city bus came from Ashok Stambh side and stopped near Prabhu-Iochha Laundry and many passengers got down from the said bus. Amongst those passengers, the accused also got down. He was seen and identified by Police Constable Namdeo Jadhav and was accosted. PSI Sonar asked him his name which he disclosed as Mohan Ramji Goyal and PSI Sonar told him that he wanted to take his search. Accordingly, the accused was surrounded and the match box was found in his right hand side trouser pocket and the same was opened by PSI Sonar in the presence of both the panchas and five small wrappers were found kept in the same. These five wrappers were then opened and powder of brown sugar was found in each wrapper. All the wrappers were put on the weighing scale and the total weight came to 1 gm and 370 ml.gms. along with the wrappers. The wrappers were refolded and kept in the match box which was sealed. Panchanama to the said effect was drawn at Exh.11 and it was written by one of the three constables and signed by two panchas and PSI Sonar. The witness proved the contents of the

said panchanama to be true and correct. Thereafter, the raiding party members came back to the Sarkarwada Police Station and PSI Sonar submitted a report in writing to PI Panditrao (Exh.15). In turn, PI Panditrao directed to register the crime and consequently he filed his complaint (Exh.17). Muddemal report was submitted (Exh.16). PSI Sonar registered C.R. No. 159 of 1988 on the basis of the complaint filed by PW 2 and entry of registering of crime was also made at Sr.No.43 (Exh.38). In his cross-examination he admitted that he could not remember if the accused had got down from the bus from the front door or the back door and no passenger got down from that bus in their presence. The accused was caught immediately within two minutes after he got down from the bus and PC Namedo had gone ahead towards the accused thereby suggesting by his action that he had identified the person and other members of the raiding part to understand that the person got down from the bus was the accused. He admitted that he did not give search of his person to the accused before he was searched. This evidence by and large supported by the other witnesses, namely, PW 1 and PW 4.

5. It is pertinent to note at this stage that PC Namdeo has not been examined by the prosecution. None of the witnesses examined by the prosecution disclosed before the court that they had known the accused earlier and were also aware that the name of the accused was Mohan Ramji Goyal. PW 1, PW 2 and PW 4 stated that they proceeded towards the accused as per the signal given by PC Namdeo who had identified the accused and gave signal. Secondly, when the witnesses were called by PW 2 Aher, it has not come in the depositions of all the three witnesses i.e. PW 1, PW 2 and PW 4 that they were offered search of the raiding party or that the wintesses were searched along with the raiding party by PI Panditrao. Even when the raid was carried out at the spot, there is no indication that samples were drawn either by PW 2 or P 4. PW 2 admitted in his cross-examination that he did not give his search or none of the raiding party member offered search of their person to the accused before taking his search. From the depositions of PW 1, PW 2 and PW 4 it is also clear that the accused was not informed about is right for being searched before

a Magistrate of his choice and that he refused such an offer and thereafter PSI Sonar carried out the search. The evidence of all these witnesses is unanimous, namely, that as soon as the accused was caught hold of by PC Namdeo, PSI Sonar carried out the search of his person and took out from his pocket a match box in which the five wrappers were claimed to be found. It is a well settled position in law that when the personal search of an accused is carried out, the requirements of Section 50 of the NDPS Act are mandatory. It is thus clear that the prosecution could not bring before the trial court the identity of the accused either by his personal descriptions or as known to any of the witnesses, the samples of the material seized were not drawn and were not sent to C.A. and the mandatory requirements of Section 50 of the NDPS Act were not complied with. In the circumstances, the order of conviction and sentence passed by the learned 3rd Additional Sessions Judge, Nashik in Sessions Case No. 37 of 1989 is unsustainable.

6. In the result, the appeal succeeds. The order

of conviction and sentence passed by the learned 3rd Additional Sessions Judge, Nashik in Sessions Case No. 37 of 1989 dated 5/7/1989 is hereby quashed and set aside and the appellant is acquitted. The bail bonds of the appellant stand cancelled.

(B.H. Marlapalle,J.)